FILE COPY

FILED
FEB 19 193
CHARLES ELMORE CR

No. 513

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, *Appellant*

-vs-

O. B. LIMEHOUSE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR O. B. LIMEHOUSE

WILLIAM C. WOLFE,
LOGAN & GRACE,
Attorneys for Appellee.

INDEX:

	Page
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	2
Summary of argument	3
Argument	4
Appendix (legislative history)	26

CITATIONS

Cases:

Ash Sheep Co. v. United States, 252 U. S. 159	22
Donnelly v. United States, 276 U. S. 505	23
Dysart v. United States, 272 U. S. 655; 71 L. Ed. 461; 4 Fed. (2d) 776	4, 6, 7, 12, 13
Marshall Field & Co. v. Jno. M. Clark, Collector 143 U. S. 649; 36 L. Ed. 294	7
McBoyle v. United States, 283 U. S. 25	20
People v. Eastman, 188 N. Y. 478; 11 Ann. 302	14
Swearingen v. United States, 161 U. S. 446	3, 7, 16
Tyomies Publishing Co. v. United States 211 Fed. 385	4, 15, 18
United States v. Carter, 231 U. S. 492	5
United States v. Chase, 135 U. S. 255; 10 Suppt. 756; 34 L. Ed. 117	9
United States v. Davidson, 244 Fed. 523	4, 15
United States v. Dempsey, 188 Fed. 450	15. 17, 19
United States v. Journal Co., 197 Fed. 415	16, 17, 19
United States v. Keitel, 211 U. S. 370	5
United States v. Mo. Pac. R. Co. 278 U. S. 269; 71 L. Ed. 322	11
United States v. O'Donnell, 165 Fed. 220	8
United States v. Smith, 45 Fed. 477	37
United States v. Thind, 261 U. S. 204	23

Statutes:

Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C.) Title 18, Sec. 682 ..... 1, 4
Act of February 13, 1925, c. 229, 43 Stat. 936, 938 1
Criminal Code, Act of March 4, 1909, Sec. 211 (18 Sec. 334, U.S.C.) 1, 2
New York Penal Code, Sec. 317 ..... 14, 36
Revised Statutes, Sec. 3893 3

Congressional Documents:

Congressional Record—
Vol. 42, pt. 1, pp. 539-542-564-995-996 ..... 28, 29, 30
Vol. 42, pp. 996-997 35
Vol. 42, pt. 3, pp. 2391-2392 40
Vol. 43, pt. 1, p. 283 40
Vol. 43, pt. 3, p. 2649 41

Sen. Rep. No. 10, pt. 1, p. 22, pt. 2, p 230 26
Sen. Doc. No. 9, 57th Cong. 27
Report of Commission to Revise, etc. 27

No. 513

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, *Appellant*

-vs-

O. B. LIMEHOUSE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR O. B. LIMEHOUSE

JURISDICTION

The jurisdiction of this Court to entertain the appeal is claimed by the Government under Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), commonly known as The Criminal Appeals Act, and by Section 238 of the Judical Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938. The appellee questions the applicability of this section in the instant case and will distinguish it under the precedents in argument. We understand that the question of jurisdiction may be raised at any time.

QUESTION PRESENTED.

The sole question presented from below is whether the District Judge erred in quashing the indictment and in sustaining the demurrer thereto on the ground that the letters set forth in the indictment are not "filthy" within the meaning of Section 211 of the Criminal Code.

STATUTES INVOLVED

The Statutes involved are correctly set out in the Government's brief and appendix thereto.

STATEMENT

The appellee was indicted in the District Court for violations of Section 211 of the Criminal Code (18 Sec. 334, U. S. C.) The indictment contains thirty counts. (R. 1-24). Each count charges that appellee

> unlawfully, knowingly, and wilfully did deposit and cause to be deposited, for mailing and delivery, certain nonmailable matter, to wit, a certain filthy letter and writing, etc.

Each count sets forth verbatim a separate letter. The District Court characterized the language of the letters (R. 26) as "coarse, vulgar, indelicate, and some of it is plainly libelous, and some possibly indecent." This is a fair characterization. The court (R. 27) said further of the language: "but it does not tend to corrupt the morals of the people in relation to sexual matters." The letters abound in billingsgate and abuse and are very offensive but not "filthy" within the meaning of the act. The Court held (R. 29), on the point whether the letters violated the act:

> The word "filthy" might conceivably be held to include matter which has no relation to sexual matters but would corrupt the morals of the people in other respects. Here, again, I think the context forbids any such construction. But even if such construction be permissible, it would not avail the Government in this case, because while the letters in question are, as has been stated, coarse, vulgar, indelicate, disgusting, and in some instances libelous, nevertheless I

cannot perceive that they would have any tendency to corrupt morals. They repel rather than incite.

The Court thus, while it did not agree with the Government in its construction of the statute, nevertheless held that the indictment should be quashed even under the Government's view of the Statute. We suggest that this court is without jurisdiction because the construction of the law was "not necessarily" passed upon.

SUMMARY OF ARGUMENT

We submit that the District Court committed no error in quashing the indictment and granting the order sustaining the demurrer thereto, on the ground that "each and every count thereof is adjudged not to state an offense against the United States, and to be insufficient in law" (R. 32). The ground for this was that the District Court held that the letters were not "filthy" within the meaning of Section 211. This word has acquired in connection with a statute of this kind a meaning similar to that given the words with which it is associated in the statute. The addition of the word to the section did not materially change its meaning.

The Standard Dictionary defines "filthy" as among other things "obscene", which had been construed in this connection; the Century Dictionary and Encyclopedia, 1911, defines "filth" as synonymous with "obscenity", which also has been construed in this connection; Webster's New International Dictionary, 1919, also defines "filthy" as, among other things, "obscene". So much for its lexicographical meaning. It has also a legal meaning. That legal meaning when the word "filthy" was used in a similar context in state statutes has been passed upon by the Courts, and certainly by implication, has been held to leave those statutes as the courts have historically defined their scope.

In Swearingen v United States, 161 U. S. 446, this Court gave to "obscene" a legal meaning in construing Section 3893 (now Sec. 211). It does not appear that Congress when the

word "filthy" was inserted in Sec. 211 intended materially to broaden the statute, although there were expressions pro and con on this point during the prolonged debates. There has been no authoritative decision since then holding with the Government's contention that such letters as those in the instant case are "filthy". The only authoritative decision bearing upon the subject implies the opposite—that of Dysart v. United States, 272 U. S. 655, 71 L. Ed. 461. In which the meaning of "filthy" was involved though not expressly considered. The case of United States v. Davidson, 244 Fed. 523, (N.D.N.Y.) cited in the Government's Brief, page 14, as "apparently the only case under Section 211. * * * in which the application of the word 'filthy' to language similar to that here involved has been passed upon", is not only not authoritative, but laboriously hesitates to pass upon the issue and apparently dubious of the meaning of the amendment leaves the matter to the jury. There is not even any record that the petit jury passed upon it nor how. The Davidson case rests in turn upon the case of Tyomies Publishing Co. v. United States 211 Fed. 358 which in reality is a case covered by the statute before Amendment.

ARGUMENT

We submit, on the question of jurisdiction which we are now raising for the first time, that mere erroneous construction of a statute by the District Court will not give this Court jurisdiction under the Act of March 2, 1907, c. 2564, 34 Stat. 1246. That construction must have been "necessarily involved". The language which we have quoted from the opinion of the District Court shows that while the Court expressed its construction of the Act as differing from that of the Government, yet the Court stated that taking the Act to mean what the Government contended, the letters did not in *fact* have "any tendency to corrupt morals. They repel rather than incite." (R 29). Hence the order quashing the indictment (R 32-33) did not *depend* upon the construction of the statute.

In a case such as this, (not where allegations of salient facts such as for instance a conspiracy to violate a statute, as in the

Keitel case, U. S. 2 Keitel, 211 U. S., 370-399 form the charging part of the indictment) where the evidence itself, that is, the letters, are set out in the indictment, what the Court passed upon was as if upon a motion for directed verdict after the Government had put in its evidence. This would not have been appealable. If the case had gone to trial, and upon the Government's proof, the District Court need not have left the case to the jury if in the District Court's view of the evidence and fully adopting the Government's construction of Section 211, it felt that no case had been made.

We submit that by analogy the principle of United States v. Carter, 231 U. S. 492, governs the case. At page 493 this Court in that case said:

> "Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did *not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment.* (Italics ours).

This, we submit, is what did happen here. A construction of the law did not *necessarily* enter into the Court's decision. The Court actually found the indictment to be "insufficient in law", (R. 32) even taking the Government's construction of the Statute as its guide and applying the content of the letters to that construction (R. 29.).

SOLE QUESTION

Barring the preliminary question of jurisidiction, the sole question presented is whether the District Judge erred in quashing the indictment and in sustaining the demurrer thereto because the letters set forth in the indictment are not "filthy" within the meaning of Sec. 211 of the Criminal Code. The Court below held (R. 38):

> The letters now under consideration are clearly not with-

> in the meaning of the original statute as construed in the Swearingen case, and the Government so concedes. The language of the letters is coarse, vulgar, indelicate, and some of it is plainly libelous, and some possibly indecent, but it does not tend to corrupt the morals of the people in relation to sexual matters.

The entire opinion of the Court below is so cogent and in our view so thoroughly sound that nothing we may say can add much weight. It amounts to a brief. The learned District Judge was for many long years an exceptionally able and dilligent District Attorney. He necessarily often considered this section. Thus, (R. 46):

> "The writer of this opinion knows from long years' experience as a prosecuting officer for the Government that many hundreds of cases similar to this have come up for consideration and have occasioned the Post Office Department and prosecuting officers a great deal of trouble in determining whether they should be prosecuted or not in view of the amendment to the statute. Few of such cases have been prosecuted.

The original Act was passed in 1876, and until 1909 when the word "filthy" was added the case of Swearingen v. United States, 161 U. S. 446, was the authoritative case. That case to repeat, has only recently been followed by this Court in Dysart v. United States, 272 U. S. 655.

While, the learned District Court points out, the Dysart case did not touch upon the precise point "because the word 'filthy' was not under consideration in that case", the District Court adds: "It has some persuasive force, however, because it does show that the Swearingen case is still the law so far as it is applicable". We submit that it has even more than a persuasive force. By implication this Court passed upon the word "filthy", as we shall later show, in the Dysart case. This Court reversed the judgment of the District Court, which had been affirmed by the Circuit Court of Appeals and held that the matter complain-

ed of did not violate the Act. If it had been "filthy" within the meaning of the Act it must have violated it. How filthy it was in the ordinary sense of the word we shall later analyze. The language of this Court in the Dysart case certainly shows that the test of the statute is still whether the objectionable matter had a tendency to deprave and corrupt the morals of those whose minds are open to such influence. This Court says, page 657:

> The Solicitor General, with his usual commendable candor, after calling attention to the facts disclosed by the record and relevant opinions, adds: "It is not so easy to prove that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful".

From the Swearingen case to the Dysart case, an examination will show that the tendency of the courts was to adopt the Swearingen doctrine although the word "filthy" had been added. The courts jealously guarded precedents narrowly limiting common law and statutory prosecutions abridging the freedom of speech. Rather have the Courts relegated complainants to local laws against libel, slander, etc. From time to time reformers have arisen and brought pressure upon legislative bodies for legal shortcuts. But these bodies have been equally jealous of liberty. We shall see how slowly they moved even under clamor and pressure, how hard it was to persuade them to squeeze even the one word "filthy" into the law. It is even doubtful that it actually was squeezed in. We have been unable to find any record where the Senate adopted it. Though it appears as a part of the Code, as a pure parliamentary fact the amendment which was once definitely defeated in the Senate, so far as we can find was never adopted there. The report of the free conference committee does not seem to recommend the adoption of this House amendment although the various sections that were agreed upon are clearly reported. However, while in the great majority of State jurisdictions it is permissible to impeach the authenticity of an enrolled Act, we take it that the rule as laid down in Marshall Field & Co. v. John M. Clark, Collector, 143

U. S. 649; 36 L. Ed. 294, is the rule in this Court—that we are bound by the enrolled bill.

The House reluctantly conceded the amendment but perhaps as a meaningless sop. Congress probably meant for it to mean very little. It is remarkable that whereas Section 3893 was originally passed more than fifty years ago and the word "filthy" was added over twenty years ago, not one single clearcut case was brought seeking the construction of the amendment. No decision can be found under which any court has held that a sealed letter sent through the mail intended only for the eye of the recipient and which did not contain language such as was likely to corrupt morals or excite sexual impulses, is contrary to the statute. Not one.

The Government refers to the legislative history of the Bill. Certain members of Congress while the Act was under passage proposed various words or groups of words to enlarge the statute. Other equally able members of Congress were opposed. See Appendix. It is clear from the debates that when the Act was passed any member who voted for or against it could have justified his vote on whatever view of it his constituents favored. The word finally agreed upon—"filthy"—was conceded at the last moment in the mists of ambiguity.

The letter of the Postmaster General exhibited in Appendix C, p. 33 of the Government Brief does show that Anthony Comstock urged the legislation. But that letter does not show that Mr. Comstock was interested in *private letters under seal.* He in fact never was. The letter refers to him as a "Post Office Inspector". But this Court will take judicial notice that Anthony Comstock, if indeed for whatever purpose he might have been technically a Post Office Inspector, was far more than that in the moral history of his time. He was a crusader fighting precisely against pornographic art and literature, particularly when circulated through the mails or publicly exposed to view such as at galleries, museums, news-stands, book-stores, etc, but never against private letter-writing, however abusive. And the Courts have made a point as to the difference. Thus, in United State v. O'Donnell, 165 Fed. p. 220, the Court said:

If the subject matter of the indictment were charged to be a "publication of an indecent character", it would be necessary to consider whether the word "publication" could be held to include a sealed letter. This question was passed upon in the case of United States v. Chase, 135 U. S. 255, 10 Sup. Ct: 756, 34 L. Ed. 117, which was based upon the statute in its old form before the word "letter" was inserted. The Court there held that the words of the old statute could not refer to a letter.

Turning to the Chase case, we find this Court said 34 L. Ed. 119:

> In the statute under consideration, the word "writing" is used as one of a group or class of words—books—pamphlet, picture, paper, writing, print—each of which is ordinarily and prima facie understood to be a publication; * * *.
>
> It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written.

It is true that the word "letter" was afterward added to Sec. 211. But the decisions not only show how slow this court was to stretch the Act, and how it left any doubtful language to be clearly enlarged by Congress, but the Chase case has a bearing upon the instant case which we shall cover more fully later when we consider the debates in Congress. But to anticipate: these debates show that Congress was thinking in terms of "publications" and not "letters". It was only another device of Comstock to suppress immoral "publications", not to prevent billingsgate in letter writing.

Comstock was himself a man not altogether opposed to violence in his war on vice. He certainly was at times extreme in his views. Thus Mr. Shirley of Kentucky said of him while this legislation was pending in the House:

'I do not recall that the Department offered these words as an enlargement of the statute. It is true that Mr. Comstock appeared before our committee. He has been actively engaged in prosecuting violations of the existing law and has done very valuable work, but Mr. Comstock like a great many gentlemen engaged in a special line, is apt to become just a bit extreme, and his view, if it had been adopted by the committee, would have given to the Department powers that could and would have led to great abuses.

To return to a consideration of the meaning of the word filthy. If Congress had intended to broaden the Act and to bring within its meaning such language as the Court passed upon in the Swearingen case, it could have done so very simply. Legislative bodies enact laws knowing the decisions construing the meaning of words. As the Congressional debates show, proposed amendments in many words and forms which finally culminated in the word "filthy" had been under deliberation for many years. There seemed to be a determined effort to keep out *any* amendment along this line. If it were not *lese majeste* to say it, it might almost seem that Congress was "joshing". Mr. Comstock believed very much in the efficacy of law in banishing sin. But legislative bodies are not quite as ready to make all sins crimes. They would leave something to the field of conscience. Some philosophers believe that immorality loses some of its enormity when sinners are given to feel that the Commandments have been superseded by man made law. Congress is made up of practical men who very often pass laws under the push of virtuous lobbyists whose methods of reform they may not inwardly sanction, and in some cases, especially as Congress knows the meaning of words, what Congress really enacts is sometimes muddled by the mental and moral struggle between the inner views of members and their outer conformity. It is no imputation upon Congress, and certainly no reflection upon its common sense to say that in reference to such legislation members sometimes play the game.

One thing seems sure about this particular legislation—that with the historical reluctance of the courts to stretch the mean-

ing of the law even in favor of decency at the price of free speech, Congress might well have left the meaning cloudy if it did not choose to make it clear. It was manifestly not made clear or the Post Office Department would not have waited twenty years of non-enforcement to ask this Court to hold (whereas thousands in the meantime had escaped) that twenty-three years ago Congress positively meant to put a stop to such use of the mails. If the Post Office Department believed a quarter of a century ago that Mr. Comstock had won from Congress what he wanted and the Department understood the law meant what this Court is now asked to say it meant, such a competent department would have filled the courts with prosecutions under it. The Department of Justice through all these years would not have allowed the District Attorneys to permit "many hundreds of cases similar to this" to go unprosecuted.

In a note to the case of United States v. Missouri Pac. R. Co., 278 U. S. 269; 71 L. Ed. 322, the doctrine is again announced that:

> The practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect, and, though not controlling, if acted upon for a number of years, will not be disturbed except for very cogent and persuasive reasons.

The Brief for the Government sets out that the letters in the instant case were anonymous. The Government further points out that they were written as the outcome of a factional political fight. We also may mention that these anonymous scurrilous letters were written in hardly decipherable hieroglyphics, and were mailed in sealed envelopes to each individual privately. It is because this case is the outcroping of a bitter rural political election that the defendant under the advice of counsel wishes to avail himself of *the law*. This is no reflection on the Courts. It is *juries* that try cases, juries made up of men of human passions drawn from the vincinage. Often even one partisan of unconscious bias blocks acquittal though "eleven stubborn men" hold

out. But had the case gone to trial the defendant would of course deny that he wrote the letters.

As the District Court points out, the few cases that have been prosecuted involved not in reality the word "filthy", but the same sexual pander which has run with the law as its essence from the earliest times. We submit there can be but one reason why in a quarter of a century no such case as this has been brought under the Act, raising the absolute point. It is that after Congress had simply added another word of the same import as "lewd, lascivious or indecent", the Government concluded there had been no material change.

While, however, as we have said, there has been no decision from the court on the point, certainly the Dysart decision *implies* that the amendment made no change. First of all, it *followed* the Swearingen case—expressly reaffirming it. It is true this Court did not pass specifically upon the word "filthy". But as the word "filthy" was then in the statute, whereas it was not at the time of the Swearingen case, it was included presumably along with the other words of the statute in the charge that the section had been violated. This Court unanimously held that no offense had been charged. That was the substance of the Dysart decision, and this Court set out Sec. 211, including the word "filthy" in its decision.

In submitting the cause for the Government, Solicitor General Mitchell in the Dysart case at page 656 made use of these words:

> The rule by which to "determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires, * * *."

Let us examine the language in that case. It did not tend to excite sexual impulses, as the Court held, but if the word "filthy" as used in the statute was meant to cover language such

as was used in the case at bar, then surely this court would have held in the Dysart case that the language there used was filthy within the meaning of the Act. For boiled down, that language was a direct suggestion to young ladies of prominent familes, who received the letters, opened possibly at the breakfast table in the presence of their families, raising before their innocent minds the horrible thought that they might at the moment or at any time in the future be in a state of pregnancy through 'a mistake". (See Dysart v United States; 4 Fed. 2d. Series 766); in other words, it was suggested that by a failure to use some contraceptive they as unmarried girls might soon be mothers but that they could destroy the child if they would only hide themselves at the designated hospital until the trouble was over. Certainly this was calculated to arouse the filthiest and most revolting thoughts as well as the most furious resentment. Those letters could have led to any consequence except one. *They had no tendency whatever to corrupt morals or excite sexual impulses.* That was impossible. The letters in the instant case might also excite every passion, but the same one.

In the Appellant's Brief, page 6, we read:

> The letters set forth in the indictment are not calculated to corrupt the minds or morals of those in whose hands they fall. But they abound in vile epithets and charges of disgusting immorality.

That is true, and we submit it is the gist of the case. The Appellant's Brief points out from the debates in Congress, page 13, that when the proposed amendment was finally considered in the house, in place of the suggested words "vile, filthy or indecent" the words "and every filthy" were inserted, and the Bill became law. Thus we find that the very word "vile" which the Government uses to characterize these letters, was stricken out of the amendment.

When Congress employed the word "filthy" it had before it the opinion of a very high State Court passing upon the meaning of a similar law of New York State including the word "filthy".

Mr. Comstock was from New York State. Most of his activities as a moral reformer had been in New York City. He may have fathered the very law which was construed in the case of People v. Eastman, 188 N. Y. 478; 11 Ann Cases 302. On May 21st., 1907, shortly before Congress added the word "filthy" to the law as the Post Office Department says at Mr. Comstock's suggestion, the New York Court of Appeals passed upon the meaning of Section 317 of the Penal Code (N. Y.):

> Section 317. Obscene prints. 1. A person who sells, lends, gives away, or shows, or offers to sell, lend, give away or show or has in his possession, with intent to sell, lend, or give away, or to show, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, *filthy,* indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matted of an indecent character.

Note also that the title of the section is "Obscene Prints."

In a per Curriam opinion the New York court says:

> The word "indecent" is used in a limited sense in this connection and falls within the maxim of noscitur a sociis.

We submit that the Court equally would have said that the word "filthy" was used in the same limited sense and fell within the same rule of noscitur a sociis, as did the learned District Judge in the instant case. The Court referred to the word "indecent" only in conection with the term "of an indecent character" as charged in the indictment, and as of the group to which all the words, including "filthy" belonged. Federal Sec. 211 is not as broad as the New York Act.

Chief Justice Cullen, speaking of the publication in People v. Eastman, (supra) said, Page 479:

"The court is of the opinion that the publication set forth in the indictment is improper, intemperate, unjustifiable, and highly reprehensible, nevertheless it is not indecent, as that word is implied in Section 317 of the Penal Code.

The definitions given by the standard lexicographers are not controlling in deciding its legal signification; many meanings as used in ordinary conversation are also irrelevant.

When it is considered that this case was expressly referred to in Congress during the debates there can be hardly a doubt that "filthy" was employed intentionally to confine the Act to the same general subject.

The Government seems to put much stress on the case of U. S. versus Davidson, 244 Fed. 523. We quote from the Government's Brief: (Pages 14-15)

Apparently the only case under Section 211, except the instant case, in which the application of the word "filthy" to language similar to that here involved has been passed upon is United States v. Davidson, 244 Fed. 523 (N.D.N.Y.), in which the court overruled a demurrer to the indictment and held that the question whether the language was 'filthy' should be left to the jury. The word 'filthy' in this statute has been given a broad construction in the only other cases in which its meaning has been expressly considered, Tyomies Publishing Co. v. United States, 211 Fed. 385 (C.C.A. 6th) and United States v. Dempsey, 188 Fed. 450 (E. D. Ark). See also Atwell's Federal Criminal law (Fourth Ed.) pp 260-261.

Actually, this seems to be the sum total of the Government's case.

In the Davidson case, there were two counts in the indictment. The court sustained a demurrer to one and overruled a demurrer to the other, leaving the question on that count to be decided by a jury.

We submit that a reading of the entire opinion in the Davidson case will convince this court that the Honorable District Judge left the case to the jury not because *he* construed the word "filthy" as materially adding to the statute, but the contrary. All the way through, in considering the word "filthy" the Court speaks as if the letter must "suggest libidinous thoughts and sexual desires with those readers into whose hands it might come", or that it would "tend to deprave the morals of such readers in that direction". Considering whether it should be left to the jury, the learned District Judge, after quoting from the objectionable language, p 527, said:

> "Is it a filthy letter or writing of an indecent character? Is the tendency of this letter to deprave or corrupt the minds of those open to lascivious influence? Is there any chance that reasonable men would hold it obscene, lewd, or lascivious? * * * * * * *" In this case the letter charged the addressee with having committed adultery with her son-in-law. This, of course, charged sexual impurity, but it was held it could not in any way corrupt the mind or the morals of the recipient. * * * *
>
> If the decision of that case was correct, then this letter in the instant case is not within the statute cited, as it charges the recipient with being the mother of a bastard, and prostitute, and with having a bunch of prostitutes and bastards about her as her only backers and associates. The letter would invite the anger and indignation and resentment of the recipient rather than have a corrupting influence on her or on anyone who might read it. Clearly, it would not excite sexual desires or passions.

The court reviews numbers of cases, including the Swearingen case and finds that all these cases adhere to the established construction upon such words in conection with similar statutes, as "obscene", "lewd", "lascivious" and "indecent". It then takes up the few cases arising since the amendment. It sets out the character of the publication in U. S. v. Journal Co. 197 Fed. 415, in which case the Court granted a motion to quash (from

which the Government did not appeal). The learned Judge speaks of this case as "apt and instructive".

It quotes freely from the language of the Journal case, but we prefer not to do so. We shall use only that portion of the Court's opinion which characterizes it, 244 Fed. 530.

> The language of this publication, as matter of course and of necessity, was foul, nasty and indecent, but the court said, in substance, that while the publicatoin and circulation had best not been made, still the publication and reading of same, instead of tending to deprave and corrupt the minds and morals of readers whose minds are open to such influences by arousing and implanting therein obscene, lewd, and lascivious thoughts and desires relating to sexual impurity, should rather have the very opposite or contrary effect. The indictment was quashed on this and other grounds. The casess seem to tenaciously adhere to the doctrine that one class only of writings and publications are forbidden the mails by this section, viz, those which have a tendency to excite the sexual feelings and desires and which tend to deprave the morals of the reader in that direction.

The learned Court then proceeds to consider the Dempsey case. Please observe that the Dempsey case is one of the three cases cited by the Government. (Brief p. 15). Of that case the Court says p. 531:

> This language is so clearly suggestive of sexual impurity, and is so carefully calculated and designed to suggest and awaken sexual thoughts and desires with those whose minds are that way inclined, that it comes within the definition or construction placed on the statute by the Supreme Court. It is not filthy, but clearly lascivious, which means, 'tending to excite voluptuous emotions; luxurious' * * *"

Going back to the older cases and taking the statute to pieces chronologically the Court nowhere finds anything that in any

material sense has changed the law, but finally leaves the case to the jury practically under the old test, before doing so saying, p. 533:

"I do not think a case for a jury is persented unless the writing is either obscene, lewd, lascivious, or so filthy as to be of an indecent character, as *heretofore defined*, in the opinion of the Court. Clearly, the court must construe the statute and its meaning, and define the meaning of such of the words therein; and if the article complained of as a whole and in each of its expressions is not within it, no case for the jury is presented. Is it for the court to say, as a matter of law, that all this would not suggest libidinous thoughts and sexual desires with those readers into whose hands it might come, or would not tend to deprave the morals of such readers in that direction?"

The Court then holds that it should follow the case of Tyomies Pub. Co., v. U. S. 211 Fed. 385. (The Court, however, makes no point that the matter complained of in the Tyomies case apparently would have been nonmailable before the amendment). Then the learned Judge—we frankly cannot undestand why—proceeds:

Does not this decision, while not binding, require this court to have submited to the jury on a trial the question whether or not this letter was "filthy" within the meannig of the statute? The language is clearly "vulgar" and "offensive to the moral sense" in matters relating to illicit sexual relations, and it is therefore of the same general character as is written language prohibited the mails and covered by obscene, lewd and lascivious.

And we most respectfully submit, the learned Court then illogically concludes:

I think the language "filthy * * * letter * * * of an indecent character" brings within the statute a communication sent to another through the mails which would not be

covered by the preceding words obscene, lewd, and lascivious if it be a filthy letter of an indecent character, even though it is not of a character which would promote or excite sexual desires or emotions.

The decision in United States v. Journal, (supra) was rendered in June, 1912, when the Government had had ample time since the adoption of the amendment, (March, 1909) to chart its course. The case grew out of the publication of evidence in a celebrated murder trial at Richmond. The opinion of the Court stated that "the leading papers of the Unted States teemed with accounts of the murder, and particularly of the proceedings and the trial". (p. 416). There can be no doubt that the *whole* of the statute, including the word "filthy" was in the mind of the Court, for the Court said (p. 416) "the question of the character of the contents of the paper—whether it comes within the inhibited class named *in the statute*— is one ordinarily to be determined by the jury under appropriate instructions from the court—that is when there is such doubt as to the meaning and effect of the same, that persons would reasonably differ in respect thereto." (Italics ours.).

The court was passing, not upon whether the word "filth" was used in the charging part of the indictment but upon whether the "contents of the paper * * * comes within the inhibited class named *in the statute*". That inhibited class of course included "filthy".

That opinion was written after the Dempsey case, to repeat, upon which the Government seems partly to rely (Brief p. 15). In the Dempsey case the court saw fit to submit the issue to the jury. But the language complained of in the Dempsey case was easily within the act even without the word "filthy" and the language was not "filthy" either in the legal or the vernacular sense. It was in fact soft and polite, but it plainly implied sexuality. If that language was not a sex appeal, we have never read one. In the case of United States v. Journal (supra) the Court did not submit the issue to the jury because the publication complained of "could not by any reasonable judgment be held to come within the prohibition of the law."

The Act giving the government the right to appeal had then been in effect five years and the law governing that right had already been clearly enunciated by this Court. The *Government did not appeal* and, therefore, we profoundly submit, the general public could place no interpretation upon the law other than that which the Government itself placed upon it, by not appealing in this one recorded case in which the language, in the *revolting sense*, was filthy. Was it because it knew that the language, though revolting, had no sex arousal in it, and was not contrary to the statute? The answer to this question can only be found in the archives of the Post Office Department.

We beg at this point that the Court will read again from the Transcript of Record below (R. 28) the lucid analysis of the history of the legislation in Congress. We particularly call attention to the lower Courts' reference to the case of McBoyle v. United States, 283 U. S. 25, 27, in which this Court recently said:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, *of what the law intends to do if a certain line is passed.* (Italics ours).

Surely if this rule applies to the construction of a law by "the common world", with how much more assurance might that common world accept the meaning of a law which has been construed by the courts in a celebrated case such as Sec. 211 was in the Journal case?

Moreover, Congress which had passed the law, accepted that construction also. The Post Office Department likewise. For twenty years since the Journal case was decided literally millions of tons of such publications—often much worse—have passed through the mails. Only read the daily tabloids or some weekly or monthly magazines. Truly do they "contain torrents of foul language" in the words of the Government Brief. Perhaps some members of Congress read them—perhaps some publish them;

"Post Office Inspectors", no longer Anthony Comstocks, may also read them, perhaps subscribe to them at their homes. Someone must read them, for every year huge forests are turned into pulp to keep the mail trains running. In deed so desirous is the Government to encourage the circulation of second class matter that it is handled at a loss. It is incalculable how many rolls of virgin paper have been soiled in these twenty years while the Post Office Department has accepted the situation. Liberty, how many sins have been committed in thy name! That is one side of the picture. The other—is the sacred right of free speech. It may be well—some believe it is—for a great *Moral* censor to place thought under restraint by an Index Expurgatorious, thus protecting faith and morals. But the State—after all, is not its province "to prevent crime not sin?" Someone has said so. But at any rate Congress still looks on, thinking the matter over.

The literature scattered through the mails in these twenty years has not been in sealed envelopes addressed to individuals who upon opening them have the option of tearing it up. It has been blazoned in scare-heads across front pages. In fact the object in printing it is to sell it, in other words to be rewarded for it; or worse the diabolical object of corrupting the innocent. No Post Office start has been made against that. Must it be left to make a late start by bringing a case against some cryptic mad-man—for whoever wrote these letters is such—or, (mark the word) some mad-woman who has thus far hidden behind these hieroglyphics? Indeed many experts in the anonymous and scurrilious first "look for the woman," the French maxim newly applied.

We submit, also, that it is not quite fair in fact, though the Government perhaps could not avoid it to stick these foul letters in print before the eye of this Court. The Court is bound to recoil. These deranged letters undoubtedly damage the reason for the moment of whoever reads them. Whether they were mailed by someone bent on revenge for a then recent homicide, as some believe, or by the hand of malice for the purpose of pointing the hatred of a small community against a defeated candidate, supposed to have a political grudge in mailing them,

and in cunning simulation of many of his pet resentments is one theory in which case the defendant could not have written them; or whether, as alleged by the Government they were actually written by the defendant in policital chagrin—one thing is certain, that they were written calculated to arouse the *anger* of each recipient and not the lust. If the letters however are not "filthy" within the meaning of the Act, why should the Court leave to a jury and to an already over wrought community the further agony of washing its most private linen in public? So that although these letters which were received, each in private, have been opened up in public by the Government before the eyes of this Court, we beg that this Court, as of course it will, after the first natural shock of reading them has passed, will resume its judicial habit. It will be hard, but that is what we ask. If the mailing of these letters was not a crime, though it was terrible, why should first the defendant and then upon his acquittal as many as may be thereafter suspected be put through such trials as will follow until someone is convicted or discovery abandoned?

At page 6 in the Government's Summary of Argument, and again at page 9, the Government refers to the action by Congress as if it were specifically taken to meet the decision in the Swearingen case. As we have pointed out, Congress was at the time the amendment was passed engaged in the codification of the entire body of the criminal law, and only considered Section 211 as a part thereof. It is significant that if Congress adopted Section 211 to meet the Swearingen case, all these years have since gone by and Congress has done nothing further to clear up the Act, especially in the light of the decisions that have followed the Swearingen case. See Ash Sheep Co. v. United States, 252 U. S. 169. The Government cited this case on a point upon which we do not think it applicable. But we do think it applicable on this point—that is, that long acquiescence in a given interpretation of word by a Department gives those words a legal status.

Section 211 was what might be termed a section addressed to the prevention of some particular effect in the future upon persons by the use of the mails. It was not intended to denounce

letters which invariably in their vilification, or calumny, or billingsgate refer to things of the past. It cannot be imagined that the recipient of any one of these letters could be in the least thereby corrupted along moral lines. He might be deeply grieved or outraged in his sentiment, but not in his morals.

The case of United States v. Thind, 261 U. S. 204, 209, cited by the Government, p. 7, construed the meaning of "white person", under the naturalization laws. That case helps us. There is not a "common man" in this country who does not know the meaning of "white person." We have not examined the debates as they bore upon the use of the term "white person" when the act was passed. We would risk the guess, however, that it did not take Congress years to find these two words to express the legislative intent. The words "and every filthy", however, were selected in amending a statute that had existed for years whose words had already baffled understanding. No two members of Congress expressed the same understanding of what the words were intended to cover. Some said they were equivalent to the word "obscene", and "obscene" had already been judicially defined. Some believed the words would not change the meaning of the statute; others believed they would, but were doubtful how. If the words were being interpreted by the "common man" disassociated from its context in the statute as well as the judicial construction of the statute, it might have a very broad meaning. The common man could be asked whether a man that was pointed out to him was a "white person" and he would know what was meant, even though he could not answer the question. Looks are not always safe. But every common man that passed along might have a different idea of what "filthy" meant sandwiched into this statute. Congressman Shirley said during the debates about the very word that there would be as many opinions about "vile, filthy and indecent" in this connection as there were people. We should say that whereas everybody knows the meaning of "white person" nobody knows the meaning of "filthy", the meaning of which Congress itself did not agree upon at the time, and which has never been free from ambiguity—even in the Courts. Moreover this is a penal statute. The Government Cites p. 17, the case of Donnelly v. United States, 276 U. S. 505. We see nothing in

this case to alter the rule that criminal statutes must be construed strictly and in favor of the defendant. The District Court we submit stated the law correctly, "that in a criminal case of this sort, of a highly penal nature, a citizen should not be compelled to resort to proceedings in Congress to determine whether a course of action on his part is or is not prohibited by law when the statute is fairly clear on its face."

Nor are we contending that the addition of the word "filthy" is to be treated as "vain or senseless if it is possible to avoid it." We think that many things may be obscene, lewd or lascivious and at the same time not filthy. In fact, there are no two words in the English language meaning exactly the same thing. Neither obscene, lewd, nor lascivious, taken separately has exactly the same meaning as each other. But the Court has in reference to these very words held that they are to be construed under the rule of noscitur a sociis. When the word "filthy" was added it was just another addition to the family. But it went back to the same parent stem so far as the broad purpose of the act was concerned. While it has an individuality it yet bears the family resemblance. The creative power of Congress could well have given it birth in a different family if it had willed to do so. It could very clearly have stamped it with the image of a new species of crime by defining either in another section or by suitable words in the same section what "filthy" meant. As Congress had discussed the Eastman decision in which "filthy" was by implication classed with "obscene" etc., Congress could have said that it was not to remain in the society of its kindred words. Congress knew that in many of the decisions interpreting the old statute the Courts had defined obscene, lewd and lascivious by way of illustration as synonymous with filthy at times, indecent at times, vile at times, etc., and Congress knew that the Swearingen case had tied all these words in with a definite meaning importing sex immorality. We submit that when the Post Office Department itself as appears in the record below passed up "many hundreds of cases" because it did not know what the word meant, the forbidden offence could have been clarified so the "common man" would understand unless Congress perhaps intended to leave it vague. What does it mean when used in the *lower* part of the section; that is

when the words are used: "and every letter, packet, or package or other mail matter containing any filthy, vile, or indecent thing, device or substance"? It cannot mean in this connection quite what it means above because these words were in the section without any opposition from any source when the bill was first reported from the committee, and it was only when the words "vile, filthy and disgusting" were sought to be interpolated in the upper part of the section that opposition was aroused—such opposition that the amendment was grudgingly stripped down to the one word "filthy". We submit that whereas in the second usage "vile" and "indecent" were left in the statute, and as these words met with none of the opposition that their other use aroused, filthy in the first use must have a different meaning than filthy in the second. What does it mean in the second usage? We think that it has a *sex import—there.* In fact, all the way through the statute there is a sex import. The section is a sex section; it is *pornographic* all the way through, and the word filthy added to lewd, obscene and lascivious possibly means some literature of a sex pornographic import that is far lower than what is merely obscene, lewd or lascivious—far more depraving, possibly of such a character as is calculated to arouse unnatural sex impulse. We do not believe it was meant to cover insults, libels, abuse, scurrility, or anything of any character that was directed *against* the pers[illegible]ceiving it or that was about anybody else, unless somehow it aroused either natural or unnatural sex impulses. But at any rate through many years intelligent men have differed as to what it did mean so that its meaning is to such an extent uncertain that nothing but a declaratory act of Congress in our opinion could gvie it such a meaning as would justify depriving any man of his liberty for its violation.

We submit that the orders sustaining the demurrer and granting the motion to quash should be affirmed.

Respectfully submitted,

WM. C. WOLFE,
LOGAN & GRACE,
Attorneys for Appellee.

APPENDIX

After Congress had discharged both the first and second Commissions that had been appointed to codify the laws, it constituted a Special Joint Committee on a revision of the laws and appointed its members from the Senate and House, Senator Heyburn to have the matter in charge from the Senate and Mr. Moon of Pennsylvania from the House.

This Joint Committee, of course, had before it all the reports, the recommendations of the Post Office Department, of Mr. Comstock, the Attorney General, and whoever might have any proper place in the work of revising what is now Section 211, sometimes referred to as Section 185 or as 212.

In submitting its report to the House and the Senate, this Special Joint Committee accompanied the report by an identical Bill—House Bill 11701 and Senate Bill 2982. Mr. Heyburn made only this comment as to Section 212, now Section 211:

> Aside from the transposition of language, the other changes made in this section which are designed to perfect the law so that its provisions cannot be evaded, are indicated by the words italicised.
>
> (Senate Report 10, Part 1, p. 22, Part 2; p. 230)

The following is the section as submitted by him, the proposed amendments being in italics:

> SECTION 212. (Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, *adapted,* or intended for preventing or *producing* abortion, or for any indecent or immoral use, *and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose,* and every written or printed card, letter,

circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or *from* whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed, and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be used or applied for preventing conception, or producing abortion or for any indecent or immoral purpose, and every description calculated to induce or incite a person to so use, or apply, any such article, instrument, substance, drug, medicine, *or thing, is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter-carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof,* shall be fined not more than $5,000.00, or imprisoned not more than five years, or both) (R., S. 3893, 36 Sept, 1888, 25 Stat. L. 496, c 1039, S, 2; 1 Supp., 621.)

This report and bill completely ignored so far as the insertion of "vile, filthy and indecent" was concerned the very exhaustive report submitted in the letter of transmittal of the Attorney General on December 11, 1901, transmitting "the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States", which Commission had itself been at work for several years. The report of that Commission was dated November 15th., 1901, and at page XVI thereof, Senate Documents No. 9, 57th Congress, 1st., Session, under Section 185, among other things it says:

In the light of this decision, (Swearingen) and to prevent a flagrant abuse of the mails, we have added the words "indecent, vile, or filthy", in the revision of the sections mentioned.

At page 60 of Part 2 of said report, Section 185 (Now Sec. 211) is set out in full as proposed by the Commission, beginning thus:

"Every obscene, lewd, lascivious, indecent, vile, or filthy book, pamphlet, picture, paper, letter, writing, print, or any publication of an indecent character, and every article or thing designed or intended for the prevention of conception, for the producing of abortion, or every article or thing intended or adapted for any indecent or immoral use."

While the report of the Commission thus added the words "indecent, vile, or filthy", the Report of the Joint Committee of Congress left these words out and as the debates will show, especially in the Senate, Congress was determined not to enlarge the statute. To repeat, this was after the Swearingen case, and after the Post Office Department, Mr. Comstock, the Attorney General, and the Code Commission, had undertaken to enlarge it by the use of the words "vile, indecent and filthy".

In submitting this Joint Report to the House, Mr. Dalzell, page 539, Congressional Record, Volume 42, Part 1, 60th. Congress, 1st. Session, Jan., 8, 1908, made these remarks:

"Mr. Speaker, the Bill referred to in the rule is a Bill to Codify, Revise, and Amend the Penal Laws of the United States. Members of the House will recollect that some ten years ago—to be exact, in 1897, a Commission was appointed to codify the Laws of the United States. In the first place, it was appointed to codify merely the penal laws of the United States, but its jurisdiction and duties from time to time were extended, until finally it was authorized to present a complete code revising all the laws of the United States.

In the Sundry Civil Appropriation Bill of 1906, Congress abolished the Commission and ordered that its report be made not later than the 15th., of December of that year, and its report was then made. That report covered 1900 pages and embraced 9000 sections. It was apparent, of course, that in the ordinary course of business the House could with difficulty deal with such report, and a Joint Committee of the House and Senate consisting of five members from each body was appointed, whose duty it was to examine, consider, and submit to Congress recommendations upon the revision and codification of the laws prepared by the statutory revision commission. Now, that joint commission, acting during the vacation, and acting with a great deal of industry and zeal, as I understand it, presents to the House to-day this Bill, which codifies, revises, and amends the penal laws of the United States."

From then on Mr. Moon was in charge of the legislation in the House. At page 542, Id. after some discussion, we find:

"MR. MOON of Pennsylvania: Mr. Speaker, I move that the House resolve itself into the Committee of the whole house on the state of the Union for the consideration of a Bill (H. R. 11701) to codify, revise, and amend the penal laws of the United States."

On January 9th., the next day, page 564, Id., Senator Heyburn took charge in the Senate of the same Bill, known as "Senate Bill 2982".

It meandered through both Houses as time permitted, generally when few were present. When section 211 was reached on January 22nd., Mr. Houston of Tenn., introduced the amendment "vile, filthy, or indecent" recommended in the report of the Commission. The House seemed to be in a facetious rather than a serious vein in auticipation of this. Mr. Ollie James sent up to be read a piece of ribald humor directed at Mr. John Wesley Gaines of Tenessee, and immediately Mr. Houston introduced his amendment. In the first skirmish, Mr. Moon strenuously

objected. He thought the Bill was already broad enough. Mr. Houston was supported by Mr. Alexander of New York, who asked "if there is any objection to inserting the amendment", to which Mr. Moon answered "except that it is sufficiently covered in the section as it now stands." (After the Swearingen case.) Mr. Alexander thought there could be no objection. Mr. Moon, however, said the committee had spent a great deal of time upon the word "indecent" as already in the section, and the committee deemed it wise that the section stand as it is. He said, Id, 1995-6

> "the gentleman knows that a great deal of agitation has been going on throughout the country as to the signification of this word as applied to literature, and some books have been excluded from some libraries on the action of a committee because they deemed these books indecent, when, as a matter of fact, they were current literature of the day."

He mentioned Mark Twain, and said that the Committee held that,

> "the introduction of the word here would open such a broad field of construction on the part of the Judges and the Post Office Department in the application of the criminal statute that it is unwise to use it in the connection suggested by the genteleman from Tennessee"

Then Mr. Moon, Chairman added:

> "If the gentleman from New York (Mr. Alexander) asks whether there could be any objection to excluding from the mails all kinds of indecent literature, of course there can be none, and this committee will offer no objection to any amendment that will make that more clear, but they do not think the method proposed by the amendment will accomplish the purpose."

(This shows that the Chairman was thinking in terms of indecent *literature*.)

Mr. Shirley of Kentucky arose, saying that:

"In both answer to the gentleman from New York (Mr. Alexander) I think there are very serious objections to the amendment offered by the gentleman from Tennessee (Mr. Houston). Even in legislation, the thing desired by a man is frequently very foreign from what is accomplished by the particular language used. Now, all of us are in hearty accord with the desire of the gentleman from Tennessee (Mr. Houston) to protect the mails and the public from indecent and impure literature, but some of us who have taken the trouble to look into the history of this section and the matters that have been litigated in the courts, know that there is a very great danger by the use of such words as are suggested by the gentleman's amendment by giving to the Post Office Department a censorship of the press."

He too spoke of Mark Twain's books, showing the current of thought to be on literature, for he added:

"The word 'indecent' put in front of the word 'book' would be open to such construction as would practically enable the Deparement to exercise a censorship over the press, and while I think that perhaps we should take some steps looking to a better exclusion of improper literature from the mails, we ought to be exceedingly careful that we do not use language that simply enables the Department or some person in the Department to exclude books that may not appeal to him or her.

Mr. Alexander interrupted:

I desire to ask this question: Does the Department approve of the amendment of the gentleman from Tennessee (Mr. Houston)?

To which Mr. Shirley's answer seems in our opinion to add a flood of light on the whole controversy as follows:

I do not recall that the Department offered those words as an enlargement of the statute. It is true that Mr. Comstock appeared before our committee. He has been actively engaged in prosecuting violations of the existing law and has done very valuable work, but Mr. Comstock, like a great many gentlemen engaged in a special line, is apt to become just a bit extreme, and his view, if it had been adopted by the committee, would have given to the Department powers that could and would have led to great abuses. The committee has tried to make this section properly fulfil its mission without so enlarging it as to give to the Department the power to exclude a great many publications that the majority of men do not consider immoral or indecent.

After some further debate, Mr. Shirley said:

In further answer to the suggestion of the gentleman from New York (Mr. Alexander), I desire to say the committee did consider this section at great length, not only one day but for several days, and the final judgment of the committee was against the insertion of these words, though it was understood at the time that the gentleman from Tennessee would bring the matter to the attention of the committee of the whole house.

Then followed a vitally important contribution:

MR. PAYNE: Would it interrupt the gentleman if I should ask to have the clerk read the first four lines as the paragraph would be amended by the gentleman from Tennessee?

THE CHAIRMAN: (Without objection) The Clerk will read the amendment as reported.

The Clerk reads as follows:

every obscene, lewd, vile, filthy, or indecent book—

MR. PAYNE: I want to say, if the gentleman will allow me, that comparing the two, I think the language of the committee is better than that of the gentleman from Tennessee. I do not think he enlarges it.

MR. HOUSTON: I want to call the attention of the gentleman from New York to the fact that the Clerk did not report the amendment correctly.

THE CHAIRMAN (without objection) The Clerk will again report the amendment.

The Clerk reads as follows:

every obsence, lewd, lascivious, vile, filthy, or indecent book, pamphlet, picture, paper, letter, etc.

MR. SHIRLEY: It is proper to say to the committee as a whole that the courts in construing the words 'obscene, lewd, or lascivious' have narrowed these words within a very small compass. There is no doubt the amendment offered by the gentleman from Tennessee will considerably enlarge the statute, and my opposition to it is because it will enlarge the statute, not that I am opposed in the slightest to preventing the going through the mails of books that are really immoral, but I am not willing to have language capable of construction that these words are, particularly the word 'indecent' go into the statute, and thereby give the Postmaster General and those under him the power to exercise what I believe to be a censorship over the press.

MR. LITTLEFIELD: May I ask the gentleman from Kentucky, is it not a fact your section already contains language that in order to be consecutive and intelligible should have these words put in the precenting part of your section? You say on line 22, here, 'or for any indecent or immoral use'. Now, that is the first time in your section that the word indecent occurs.

MR. SHIRLEY: But if the gentleman will notice, the word 'indecent' here is qualified by the word 'use' so that it becomes very narrow. When you speak of an indecent book, there are as many opinions as people discussing the matter, and there have been hundreds of books published within the last year or two, that you will find a dozen opinions about as to whether they were or were not indecent books. That does not apply to 'indecent use'; there the word 'indecent' is limited, but here if placed in front of the word 'book', it becomes very broad.

MR. LITTLEFIED: That same criticism to a certain extent is applicable to 'indecent, lewd, and lascivious"

MR. SHIRLEY: The courts have construed these words so as to apply only to a certain line.

MR. LITTLEFIELD: And we simply take chances under this legislation as to getting the same kind of conservative construction on the part of the courts of the language suggested. Of course it is better—I agree that it is better.

MR. SHIRLEY: Inasmuch as you are broadening the statute, if the courts shall undertake in execution of the will of Congress itself, to construe what the words mean, it would be that it was intended to give greater power, a much greater power.

MR. LITTLEFIELD: I do not think the language of the section would be open to that construction.

Then Mr. Gaines of West Virginia and Mr. Shirley got into some discussion that is not relevant except to show there was no disposition to increase the power of the Department as to non-mailability. It also shows that the mind of Congress was on the circulation of *literature*, Mr. Shirley, in fact, making this statement:

"The trouble with the amendment of the gentleman from Tennessee (Mr. Houston) is that it applies to the word 'book'. The adjective 'indecent' is subject to such construction that no man can know how far the law would go. For that reason I am opposed to this amendment".

(Cong. Rec. Vol. 42, pages 996-997)

The debate then drifted off into irrelevant topics, but was fetched up by Mr. Houston, the author of the original amendment, who said:

"Mr. Chairman, this discussion has taken rather a broad range. In regard to the power to be vested in the Post Office Department, that is not especially pertinent to this discussion. This is simply the enactment of a penal statute making a certain thing unlawful, describing certain offenses against the penal laws of the United States. This does not involve the question that the Post Office Department might exercise an abusive power or a discussion of the extent to which that power might be abusive. The authority and the power is already involved just as much as it can be by the addition of the words that I have offered by way of amendment. It is already unlawful to publish any obscene, lewd, or lascivious books. You talk about the Post Office Department having authority and power to suppress publications of certain kinds and character. There are a great many publications that ought to be suppressed to the extent of being forbidden to be transmitted through the United States mail, *such as all those matters that relate to sexual impurity and others that would be excluded by this amendment. Perhaps some of the books referred to by the gentleman ought not to be transmitted through the mails. I do not recall the ones that come within that category.*" (*Italics ours.*)

"MR. SHIRLEY: Will the gentleman yield to a question?"

"MR. HOUSTON: In a moment, but I say that the power is here given to pass upon a book and to determine whether or not it is lawful to pass it through the mails. That power exists now as to those things forbidden and made penal by this statute — that is those things relating to sexual impurity. But if it does not relate to sexual impurity but to some vile, indecent, hideous, shocking kind of immorality or indecency of a different kind, then it is not forbidden from passing through the mails, and I want to say that these words that I have offered by way of amendment do enlarge that statute so as to embrace the other vile things.

"In response to the gentleman from New York who asked if the words in line 20 did not already give the same power, I want to say that these words "or other publications of an indecent character", according to the holding of the court in cases of that kind relate to similar matter, things of a similar character, and have been held to relate to matters concefning sexual impurity. Now those other things ought to be prohibited just the same. I want to call attention to the language of the Penal Code of New York, in forbidding the sale of certain articles along this line.

The articles that are forbidden to be sold are: 'any obscene, lewd, lascivious, filthy, indecent, or disgusting book'.

That is broader than this Federal statute a good deal. It is none too broad. I think this law ought to be broadened. I think it is necessary to broaden it if you would prevent other vile and indecent things going through the mails except the particular class the courts now hold to be excluded and that I have alluded to."

MR. PARSONS: I wish to suggest to the gentleman from Tennessee, my colleague on the committee, that there has been a recent decision by the Court of Appeals of New York which holds that the words of the section that he has just read apply only in a case where sexual impurity is

suggested, and that those words are confined to about the same meaning that they are here confined to.

MR. HOUSTON: Do you mean the words contained in my amendment?"

"MR. PARSONS: The words you just read from the New York Code."

MR. LITTEFIELD: If that were the correct construction, this would not enlarge the Act at all."

MR. PARSONS: I also wish to suggest to the gentleman from Tennessee that his words do not enlarge the Act; that a Federal Court has decided that the word 'obscene' in this section includes what is indecent or filthy. I will refer him to 'U. S. v. Smth, 45 Fed. Rep. p. 477' ".

MR. LITTLEFIELD: Then the Act is subject to all the adverse criticism made by the Committee."

This clearly shows that Congress had the Eastman (N. Y.) case in mind and was contemplating the word "filth" in the light of its meaning. It also shows Congress, thought the Federal Courts had already defined "filth" as synonymous with "obscene".

"MR. SHIRLEY: Mr. Chairman, I do not agree to that proposition at all.

"MR. CHAIRMAN: The time for the gentleman from Tennessee has expired.

"Mr. SHIRLEY: I ask that the gentleman's time be extended five minutes.

(It was extended)

"MR. SHIRLEY: Mr. Chairman, in answer to the question by the gentleman from New York and the gentleman from Maine, I desire to say that if the words do not enlarge the statute they are useless; if they do, I think we are going beyond where we can safely go. All of us agree we want to exclude from the mail an indecent book;

but you cannot get any agreement among us as to what is an indecent book. Some might thing that Fielding's 'Tom Jones' ought not to go through the mails. While the rest might think it was one of the classics in the English language, and should go through. There is the danger of using the word 'indecent' as applied to a book.

"MR. HOUSTON: I think that all that criticism applies to the statute as it now stands and as fully as it could with the amendment when it would be the same subject added to the one."

"THE CHAIRMAN: The question is on agreement to the amendment offered by the gentleman from Tennessee."

The question was taken and on a division there were Ayes 41 — Noes 21.

The question of quorum was raised and the discussion went over. This was on January 22nd, 1908.

There was no further discussion in the House during the 1st Session of the Sixtieth Congress. It went over. In the mean time, the same amendment was proposed in the Senate. It met with short shrift. Senator Heyburn said the Post Office Department had expressly requested "after the word 'lascivious' * * * insert 'or vile, or filthy, or disgusting' " He stated "the courts have held that certain matters do not come within the meaning of 'lascivious'."

Discussion showed that the Senate was opposed to enlarging the scope of the Bill.

Mr. Bailey objected to the word "disgusting".

Mr. Heyburn suggested that if any Senator "go down to the room of the Joint Committee on the Revision of the Laws he will see there ample reason for the insertion of this one particular word "disgusting'. The courts have interpreted the other words 'lascivious' and 'vile' and 'filthy' and yet in one place in Chicago we captured several tons of postal cards and mail matter that did not come within the definition of 'lascivious' or 'vile' or 'filthy' but they are of such a character as would leave

no occasion for argument if they could be inspected for a moment. They may be seen. They were sent over from the Post Office Department in support of their request that these words be inserted in the Bill. While I was not in favor of enlarging this or any other statute without a reason, upon seeing the class of matter which was captured recently I withdrew any possible objection to it."

Mr. Heyburn presented the matter because "our attention has been called to the decisions defining the meaning of the other words. Personally, I did not have it called to my attention until it was called to the attention of the Committee for the purpose of making the law so secure against the transmission of this class of matter that there could be no doubt about it."

MR. BAILEY: Does this section merely exclude it from the mail, or does it make it a crime for a man to put such matter in the mail?

MR. SUTHERLAND: If the Senator from Idaho will permit me, I will state that it makes it a penal offense for any person knowingly to deposit any of these things in the mail.

MR. HEYBURN: The language, if amended as I propose, will read this way:

Every obscene, lewd, or lascivious, or vile or filthy, or disgusting book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article—

enumerating them, are excluded from the mail, and—

Whoever shall knowingly deposit or cause to be deposited for mailing or delivery—

Then insert the words, 'any, etc'—

declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, etc.

That is the character of the provision

MR. BAILEY: Mr. President, I am clear that that is going too far. It is perfectly proper for the Government to make it a crime to use its mails for the transmission of vile, lascvious or obscene literature, but when you come to the point that is disgusting I think that is going too far * * *. Then I resent the idea that we have reached the point where we have to make it a crime in this country for one man to disgust another in any way * * *.

* * *

MR. SUTHERLAND: I agree with what the Senator from Texas has said about this matter. I think the statute goes quite far enough as it is. I am not only opposed to put the word 'disgusting' in the statute, but the word "vile". There are three words the Senator mentioned.

Mr. BAILEY: "vile" and "filthy".

MR. HEYBURN: vile", or "filthy" or disgusting".

MR. SUTHERLAND: I am opposed to putting in the word "vile", or "filthy", or "disgusting". * * *.

The amendment as reported was rejected.

(Cong. Rec. Vol. 42, Part 3. p. 2391-92)

Let us repeat that in both reports of the Commission to Revise and Codify the Criminal and Penal Laws of the United States we find recommended the inclusion of the word "'indecent, vile, or filthy" upon the solicitation of the Department. Nevertheless, the Senate excluded these words from its proposed bill. We are not able to find that it even concurred in the House amendment when the word "filthy" was finally added over there.

Consideration of the bill was not resumed in the House until the 2nd., Session, 60th., Congress, Vol. 43, Part 1, p. 283. Mr. Houston was prepared to offer a compromise. Mr. Mooon was willing to accept a compromise, the substitution of the word 'filthy" for all previously suggested amendments. But from

his own statement of what he understood the compromise to mean, the section by the addition of the word "filthy" would still make nonmailable only such literature as would lead to "corruption of morals". The substance of what Mr. Moon said, Cong. Rec. Vol. 43, Part 3, p. 2649, and as set out in the Government Brief, p. 31, was that he was wiling to make the section mean what he thought Congress intended when the Act was first passed and before the Swearingen case. He thought that by the use of the word "obscene" the intention was to prevent the "corruption of morals", and by the use of the words "lewd" and "lascivious" the intention was to bar such matter as was of sexual impurity. In other words, he felt that the Court in the Swearingen case had probably not adhered to what Congress originally meant by the use of the word "obscene". He thought that the word "filthy" would be taken as synonymous with what was the original meaning of the word "obscene". Nothing can be clearer however, than the long line of decisions before the Swearingen case holding that in such statutes as this the word "obscene" takes on a legal meaning which involves in some way the corruption of morals only by the arousal of impure thoughts. The word "obscene" is not a new one in the vocabulary of the law, nor was it new at the time "filthy" was used as its synonym. The Courts had always held it to be used according to the meaning in the Swearingen case. The word "filthy" was accepted by the Chairman of the Committee in its legal etymology.

It is only fair, however, to say that in the last few seconds of the perennial debate, Mr. Macon asked some questions of Mr. Moon which raised for the first time any inference that the statute might be directed against what he called "vulgar" private letters. The train was pulling out, as it were, and Mr. Moon when the House was just about ready, perhaps very gladly, to leave the question to a vote, waived good-bye to Mr. Macon in some ambiguous gesture from the platform. We submit that the question of what the word "filthy" meant must be judged by *all* the deliberations of Congress and not by the last few fleeting farewell words.